IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,

v.

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Whether state tort remedies for violation of a railroad's duty of care to provide adequate safety devices at grade crossings are preempted by the Federal Railroad Safety Act.

2. Whether state tort remedies for operating a train at an excessive rate of speed are preempted by the Federal Railroad Safety Act.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case presents issues concerning one of *amici*'s core interests: the relationship between federal regulation and the historic exercise of traditional state police powers relating to safety and health.

Railroads have operated in the United States since 1830. State common law remedies for accidents at railroad-highway crossings came into existence soon thereafter, *see, e.g.*, Isaac F. Redfield, *A Practical Treatise Upon the Law of Railways* 393-96 (2d ed. 1858), and their development has continued unabated up to the present. *See, e.g.*, 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* 1735-1801 (1897); 74 C.J.S. *Railroads* §§ 710-62 (1951 & Supp. 1992). *Amici* submit that if Congress intends to preempt the exercise of state police power of this vintage and importance, it must—as this Court's cases require—do so with utmost explicitness. *E.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The provision of the Federal Railroad Safety Act that addresses preemption, 45 U.S.C. § 434 falls far short of the requisite degree of clarity and specificity to preempt the tort remedies at issue in this action.

Amici have a further interest arising from the reliance of CSX and the Solicitor General on certain federal regulations that impose conditions on the expenditure of federal funds to support their preemption arguments. As the Court has instructed, if the federal government seeks to displace state law by conditioning a federal grant on the renunciation by the States of regulatory authority, the federal government must do so explicitly. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The displacement of state regulatory authority that occurs when States accept a federal grant is not properly re-

garded as "preemption" at all, but is rather a function of "whether the State voluntarily and knowingly accepts the terms" of what is, in effect, a "contract" whose terms must be "unambiguously" expressed by Congress if they are to displace state law. *Id.* Such clarity is plainly absent here.

Because of the importance of these questions to *amici* and their members, *amici* submit this brief to assist the Court in resolving the case.[1]

STATEMENT OF THE CASE

On February 24, 1988, Thomas Easterwood was killed when a train operated by petitioner cross-respondent CSX Transportation, Inc. ("CSX") struck his truck as he tried to drive over a grade crossing in Cartersville, Georgia. Respondent cross-petitioner Lizzie Beatrice Easterwood, Mr. Easterwood's widow, brought this action in the United States District Court for the District of Georgia seeking damages under Georgia law for her husband's death. Ms. Easterwood claimed that CSX's negligence was the proximate cause of her husband's death. She asserted, *inter alia*, that CSX had operated the train at a speed greater than was reasonable for the time and place of the accident, and that CSX had not provided adequate warning devices—specifically, automatic gates—at the crossing.

The district court held that both the excessive speed claim and the claim based on inadequacy of warning devices at the crossing were preempted under Section 434 of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434. The Eleventh Circuit affirmed in part and reversed in part. With respect to the claim of excessive speed, the court agreed with the district court that federal regulations imposing maximum speed limits for particular classes of track preempted the subject matter of

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

train speed. But with regard to grade crossing safety devices, the court concluded that the Secretary of Transportation (Secretary) had not promulgated regulations that preempted state standards governing the selection of safety devices, at least where, as here, a crossing had not been upgraded as part of a federal grade crossing improvement project. In addition, the Eleventh Circuit ruled that other claims concerning the railroad's failure properly to maintain the grade crossing could proceed to trial.

By virtue of this Court's grant of both CSX's petition for certiorari and Ms. Easterwood's cross-petition, the Eleventh Circuit's rulings on the issues of crossing safety devices and train speed are now before the Court. The Eleventh Circuit's rulings for Ms. Easterwood with respect to other claims are, however, not before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Railroad grade crossing accidents have historically been, and continue to be, frequent and deadly. Between 1985 and 1990, accidents at public grade crossings in the United States averaged 5,885 per year, with resulting fatalities averaging 628 annually. *See* U.S. Dept. of Transportation, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin*, No. 13, at 3 (July 1991). And while the number of accidents has declined somewhat in recent years, the 1980s saw an increase in the severity of railroad crossing accidents. As DOT has reported:

> Though the number of accidents is declining, the number of fatalities is not keeping pace, as the average number of fatalities per crossing accident is increasing. Crossing figures show that fatal accidents, as a proportion of all accidents, have been increasing in number by more than one-tenth of a percent per year. More than 7 percent of all crossing accidents in 1986 and 1987 resulted in at least one fatality. A highway vehicle occupant is more than 11 times more likely to die in an accident involving a train than in other highway accidents. Rail-highway crossing accidents are already the most

> severe kind of highway accident, and severity is increasing.

U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 2-10 (April 1989).

Georgia, in common with other States, has historically addressed the problem of rail-highway accidents by providing a tort remedy for persons injured in such accidents as a result of a railroad's breach of its duty of care. Where a State acts in such a traditional area of its police power authority, this Court has recognized that there is a powerful presumption against preemption, and that assertedly preemptive federal statutes must be narrowly construed. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992).

The statute relied on for preemption here, 45 U.S.C. § 434, is expressly limited in scope. Indeed, the statute is plainly designed to *preserve*, not preempt, state authority, except where the Secretary has specifically regulated with respect to a particular subject matter.

Properly read in conformity both with the presumption against preemption and its own express limits, Section 434 does not preempt Ms. Easterwood's rights of action, for the Secretary has not regulated their subject matter. With respect to non-federally funded grade crossings, the Secretary has not regulated the subject matter of the selection of protective devices. Indeed, even with respect to federally funded grade crossings, the Secretary's regulations do not preempt the subject matter of a railroad's duty of care with respect to warning devices. Nor is Ms. Easterwood's train speed claim preempted. The Secretary's regulations do not address the subject matter of a railroad's duty to operate at a reasonable speed in light of prevailing local conditions, but only the more limited subject of maximum train speed for classes of track.

Finally, even if the Secretary's regulations are construed to cover the same subject matter as Ms. Easterwood's state law tort action, her rights of action are still

not preempted, as they fall within Section 434's savings clause for state standards that address "essentially local safety hazard[s]." The duties of care that Ms. Easterwood seeks to enforce intrinsically address themselves to peculiarly local conditions, and thus are not preempted under Section 434.

ARGUMENT

I. THE FEDERAL RAILROAD SAFETY ACT'S PREEMPTION PROVISION MUST BE NARROWLY CONSTRUED

A. Railroad and Highway Safety Issues Are Matters Within the States' Traditional Police Powers, and There Is a Strong Presumption Against Preemption in this Area

At issue in this case are matters of public safety involving rail and highway traffic—matters close to the heart of the States' historic police powers. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978); *Railway Express Agency v. New York*, 336 U.S. 106, 109-11 (1949); *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943); *Sproles v. Binford*, 286 U.S. 374, 388-89 (1932). Georgia has long chosen to exercise its police power by providing a right of action to persons injured as a result of a railroad's failure to exercise due care with respect to grade crossing safety or excessive train speed. *See, e.g., Atlanta & W.P.R.R. v. Wyly*, 65 Ga. 120 (1880); *Central of Ga. Ry. v. Bond*, 111 Ga. 13 (1900), *Seaboard Coast Line R.R. v. Wallace*, 181 S.E.2d 542 (Ga. App. 1971); *Central of Ga. Ry. v. Wooten*, 295 S.E.2d 369 (Ga. App. 1982). In this respect, the law of Georgia is in conformity with that of virtually all other States, which have, since the mid-19th century, provided tort remedies to persons injured through railroad negligence—including negligence in providing safety devices at grade crossings and in operating trains at unsafe speeds when approaching grade crossings.[2]

[2] *See, e.g., Linfield v. Old Colony R.R.*, 64 Mass. (10 Cush.) 562 (1852); *Pennsylvania R.R. v. Miller*, 99 F. 529 (3d Cir. 1900)

When a State exercises its traditional police powers to address a substantial issue of public safety, preemption by federal legislative or regulatory action is highly disfavored. Indeed, this Court has repeatedly emphasized that there is a "*presumption* that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985) (emphasis added); *accord Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 725 (1985). The existence of a "long history of state common-law . . . remedies" adds weight to this presumption. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *see also California v. Zook*, 336 U.S. 725, 733-35 (1949). "Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, . . . 'we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This Court most recently addressed these principles in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992), in which it reiterated "the strong presumption against pre-emption." *Id.* at 2621.

(collecting state cases); *Atlantic Coast Line R.R. v. Pidd*, 197 F.2d 153 (5th Cir.) (applying Florida law), *cert. denied*, 344 U.S. 874 (1952); *Chicago, B. & Q.R.R. v. King*, 337 F.2d 510 (8th Cir. 1964) (applying Iowa law).

See generally Isaac F. Redfield, *A Practical Treatise Upon the Law of Railways* § 172 (2d ed. 1858); Christopher F. Patterson, *Railway Accident Law: The Liability of Railways for Injuries to the Person* 157-67 (1886); 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* 1735-1801 (1897); John L. Cable, *Rights & Responsibilities at Railway Grade Crossings* (1929); 74 C.J.S. *Railroads* §§ 710-62 (1951 & Supp. 1992); ABA Tort and Insurance Practice Section, *Issues in Railway Law: Limiting Carrier Liability and Litigating the Railroad Crossing Case* (1990). *See also* Association of American Railroads, *Compilation of States' Laws and Regulations on Matters Affecting Rail-Highway Crossings* (1983) (state-by-state compilation of statutes and regulations).

As *Cipollone* makes clear, the presumption against pre-emption has several corollaries. The first is that "'"[t]he purpose of Congress is the ultimate touchstone"' of pre-emption analysis." *Id.* at 2617 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). It follows, therefore, that when Congress includes in legislation a provision that expressly addresses preemption, the preemptive effect of the legislation is limited by the express preemption provision, and resort to implied pre-emption doctrines is unwarranted:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S., at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Id. at 2618 (parallel citations omitted).

Further, *Cipollone* makes clear that when addressing an express preemption provision, the Court "must fairly but—in light of the strong presumption against pre-emption—narrowly construe [its] precise language." *Id.* at 2621. Only where the language used by Congress reveals its manifest intention to preempt state law may a State's exercise of its police powers be displaced, and then only to the degree specified by Congress.

B. Section 434 Expressly Preserves State Law, and Its Preemptive Effect Is Very Narrow

Given the foregoing principles, the starting point for preemption analysis in this case is, as CSX and its *amici* recognize, the express preemption provision of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434. Analysis of Section 434 reveals that its preemptive effect is subject to significant, expressly stated limits—limits that CSX and its *amici* ignore or obfuscate.

Remarkably, CSX asserts that "Section 434 pre-empts 'any law . . . relating to railroad safety,'" CSX Br. 23, and proceeds to argue as if the statute contained such a broad preemption provision. *Cf. Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). This argument is flatly contradicted by the statutory language. Section 434 does *not* preempt "any law relating to railroad safety." On the contrary, it expressly preserves state law, providing in pertinent part:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

As this language makes clear, far from *preempting* "any law . . . relating to railroad safety," Section 434 in fact provides that a State *may adopt (or retain) any law relating to railroad safety* unless and until the Secretary has enacted a regulation covering the subject matter of the state law.[3] The legislative history confirms the plain meaning of the statutory language—that Section 434 was

[3] CSX correctly points out that the terms "any law" and "relating to" are conspicuous for their breadth. CSX Br. 25. Ironically, however, what CSX thus demonstrates is not the breadth of the preemption accomplished by Section 434, but the breadth of the state regulation Section 434 *permits*.

intended *not* as a preemption provision of extraordinary breadth, but as an affirmation of state authority except where specifically displaced by federal regulation. As the House Report on the FRSA explains, Section 434 "*authorizes States to regulate in any area of railroad safety until the Secretary acts with respect to the particular subject matter.*" H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4112 (emphasis added).[4]

The carefully limited language of Section 434 and the general principle of narrow construction of preemptive statutory language are mutually reinforcing. Contrary to CSX's contention, the result is not a preemption of state law far more sweeping than that accomplished by the statute at issue in *Cipollone*, CSX Br. 25, but rather a preemption that is at least as narrow and focused. As in *Cipollone*, state regulation must stand unless it is preempted under a fair but narrow reading of the statute—that is, under a reading that permits any state regulation of railroad safety unless the Secretary has enacted a regulation that addresses the particular subject matter of the state safety regulation.

[4] CSX and its *amici* stress passages in the legislative history that indicate Congress desired greater uniformity in the regulation of railroad safety. But Congress' expressed desire for uniformity "to the extent practicable," 45 U.S.C. § 434, is necessarily limited by the terms of the statute Congress enacted. The statute (and the legislative history) make clear that Congress expressly accepted the possibility of nonuniform state regulation when it provided that any state regulation of railroad safety was permissible except when the Secretary had specifically regulated the same subject matter. Notwithstanding Congress' abstract desire for uniformity, "disuniformities . . . are the inevitable result of the congressional decision to 'save' local . . . regulation." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Moreover, CSX's citations are out of context—for example, CSX's cites to passages in the House Report that explain Congress' reservations about allowing States to bring enforcement actions to impose penalties based on violations of federal safety standards (an issue not relevant here). *See* CSX Br. 7 (quoting H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4109).

II. STATE TORT REMEDIES FOR VIOLATION OF A RAILROAD'S DUTY OF CARE WITH RESPECT TO SAFETY DEVICES AT GRADE CROSSINGS ARE NOT PREEMPTED UNDER SECTION 434

A. The Secretary Has Not Acted with Respect to the Subject Matter of Warning Devices at Grade Crossings Not Improved with Federal Funds

CSX argues that Ms. Easterwood's tort action is preempted insofar as it seeks to impose liability on CSX for violation of a duty of care with respect to the selection and installation of warning devices at the grade crossing where her husband was killed.[5] But CSX points to no regulation promulgated by the Secretary that addresses the particular subject matter of requirements for the selection of warning devices at grade crossings, such as this one, that have not been improved with federal funds.[6]

The reason for this failure is simple: there is no such regulation. Pursuant to the authority of the FRSA, the Secretary has promulgated hundreds of mandatory railroad safety regulations. *See generally* 49 C.F.R. Chapter II. But nowhere has the Secretary promulgated gener-

[5] The specific claim that CSX argues is preempted is that automatic gates should have been installed at the crossing. Automatic gates are one form of active traffic control device for railroad grade crossings; others include warning bells and post-mounted or cantilevered flashing lights. *See* Dept. of Transportation, *Manual on Uniform Traffic Control Devices* 8D-1 (1988).

In this Court, CSX limits its preemption argument to Ms. Easterwood's warning device and excessive speed claims; CSX does not argue that Ms. Easterwood's other theories, which included claims that CSX had failed to maintain the crossing so as to present an unimpeded view and that there was a dangerous "hump" in the middle of the crossing, are preempted.

[6] As the United States points out, CSX's failure to establish preemption with respect to the subject matter of warning devices at non-federally funded crossings dooms its preemption arguments in this case. *See* U.S. Br. 26-27. We address below the United States' further argument that in other cases involving federally funded crossings, an action similar to Ms. Easterwood's might be preempted. *See infra* at 17-22.

ally applicable standards dictating what warning devices (beyond crossbucks, signs, and pavement markings) are or are not required at grade crossings. Rather, the Secretary has recognized that "[d]ue to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings." U.S. Dept. of Transportation, *Manual on Uniform Traffic Control Devices* ("MUTCD") 8D-1 (1988).

In its effort to find federal regulations to which it can attach preemptive weight, CSX is forced to invoke regulations that are plainly inapplicable and that do not remotely address the subject matter of the selection of warning devices at crossings that have not been upgraded with federal funds. Thus, CSX makes much of 23 C.F.R. § 646.214(b), which it contends addresses the selection of warning devices for grade crossings; but CSX overlooks that this regulation is by its terms applicable *only* to the implementation of *federally funded* grade crossing improvement projects. *See* 23 C.F.R. § 646.200. Similarly, CSX contends that 23 C.F.R. § 646.210 reflects the Secretary's judgment that the States may not take any action that would require railroads to contribute to the cost of improving grade crossing warning devices, and thus "effectively eliminate[s] the railroads' former duty to select appropriate warning devices." CSX Br. 33. But again, CSX inexcusably neglects to mention that this regulation applies only to federally funded grade crossing improvement projects, and does not in any way address the subject of duties and costs that may be imposed on railroads outside of federally funded projects.

In fact, the only relevance to this case of the regulation forbidding States to require railroads to share in the cost of federally funded projects is that it demonstrates that the Secretary did not believe that tort actions against railroads were preempted even with respect to federally funded grade crossings. In determining that railroads should not be charged for a share of federal crossing improvement projects because they were of no "net benefit"

to the railroads, the Secretary recognized that improved crossing conditions *would* benefit the railroads by minimizing accidents for which the railroads would be held liable—a clear recognition that tort actions were not preempted. The Secretary's ultimate determination that the projects were of no *net* benefit was based on the conclusion that this benefit would be offset by the increased costs the railroads would bear in maintaining upgraded safety devices. *See* U.S. Dept. of Transportation, *Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem* 103-08 (1972).

Similarly unavailing is CSX's suggestion that regulations requiring the States to survey grade crossings and develop priorities for public funding of improvement projects somehow cover the same subject matter as the railroads' duty of care in selecting crossing safety devices. *See* CSX Br. 29-30 (citing 23 C.F.R. §§ 924.1 & 1204.4). The subject matter addressed by these regulations is nothing more than the allocation of the scarce public funds available for rail-highway safety improvements. These general requirements imposed on the States —as conditions for participation in federal highway funding programs—by no means address the subjects of required safety features at particular grade crossings or the railroad's duty of care with respect thereto.

Nor is there any legitimate basis for suggesting that in providing procedures that may lead to the allocation of public funds for the improvement of *some* grade crossings, the Secretary in some fashion impliedly relieved all other parties of responsibility for grade crossing improvements. Attaching such effect to the regulations would be contrary to the very narrow preemptive language of Section 434. Moreover, it would have perverse effects from the standpoint of the overall federal goal of improving rail-highway crossing safety: the implication of CSX's position is that merely by requiring the States to *study* steps that might be taken to improve crossing safety using public funds (which ultimately may

be limited or unavailable), the Secretary relieved the railroads of *any* further responsibility under state law with respect to grade crossing improvement.[7]

In its attempt to find preemptive federal regulation, CSX ultimately places inordinate weight on a single sentence in DOT's Manual on Uniform Traffic Control Devices: "The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority." MUTCD 8A-1. According to CSX, this sentence has the force of federal regulation and, under Section 434, preempts state courts from imposing on railroads any responsibility for the selection of grade crossing devices. Although CSX concedes that the Manual does not provide substantive standards governing selection of grade crossing warning devices, CSX nonetheless contends that it allocates decisionmaking authority with respect to such devices to state and local public agencies to the exclusion of both railroads and state courts adjudicating tort actions.

Ascribing such extensive preemptive effect to a single, oblique sentence in the 500-page Manual is plainly unwarranted. The Manual is emphatically *not* a collection

[7] That the regulations requiring States to study grade crossings with a view to developing priorities for public grade crossing improvement projects were *not* intended to have such preemptive effect is confirmed by 23 U.S.C. § 409, enacted in 1987, which provides in pertinent part that "[n]otwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings, pursuant to sections 130, 144, and 152 of this title . . . shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." Of course, if the regulations requiring the States to survey grade crossings for possible improvement already broadly preempted tort actions against railroads based on breach of their duty of care with respect to crossing safety, this statute would be superfluous. The statute thus provides a clear indication that Congress did not believe that these regulations covered the same subject matter as (and thus preempted) state law tort actions.

of procedural standards dictating the allocation of state decisionmaking authority. Rather, it is an extensive collection of technical standards governing the design and placement of traffic control signs, markings, and devices, including, *inter alia*, signs and devices used at railroad crossings.[8] To the extent that the Manual has the force of regulation, it is by virtue of 23 C.F.R. § 655.603(a), which provides that "[t]he MUTCD approved by the Federal Highway Administrator is the national standard *for all traffic control devices* installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a)" (emphasis added).[9] Notably, this regulation does *not* provide that every sentence in the Manual, no matter what its subject, has the force of law. Rather, it simply states that the specifications in the Manual provide the standard for *traffic control devices*. There is no suggestion that descriptive statements in the Manual concerning the allocation of state decisionmaking authority are to be transformed into prescriptive regulations with the force of law.

It is therefore evident that the statement relied upon by CSX is, at most, a truism—the MUTCD's authors' description of generally prevailing state administrative practices. It is not a regulation that, by virtue of Section 434, preempts any principle of state law imposing a duty of care on a railroad with respect to the selection of appropriate crossing safety devices (or empowering

[8] It bears emphasizing again that with respect to railroad crossing devices, the Manual does not purport to state when any particular safety marking or device (beyond crossbucks, signs and pavement markings) must be used; it merely describes the specifications particular devices must meet when they are selected.

[9] Similarly, 23 C.F.R. § 646.214(b)(1) provides that, with respect to federally funded grade crossing improvement projects, "[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways . . . ." Ironically, § 646.214(b)(1) also recognizes that the Manual is subject to "supplement[ation] to the extent applicable by State standards"—a further indication of the invalidity of using the Manual as a basis for wholesale preemption of state law.

a State's common-law courts to enforce that duty). Ascribing broad preemptive effect to such an isolated and ambiguous sentence would be directly at odds with the presumption against preemption recognized in *Cipollone* and its precedential forebears.[10]

Moreover, it is abundantly clear that the Secretary never intended the Manual to have such broadly preemptive effect. The Secretary's 1989 Report to Congress makes clear that the Secretary believed not only that state common-law tort actions based upon grade crossing design were not preempted, but that railroads were increasingly subject to such actions. Thus, the Secretary informed Congress that:

> Accident liability costs are a significant and escalating concern. Although precise information is both sensitive and scattered, the railroads alone may be incurring litigation costs of more than $100 million annually arising from train-motor vehicle accidents at crossings.

U.S. Dept. of Transportation, *Rail-Highway Crossings Study*, at 4 (April 1989). More significantly, the Secretary emphasized that "[i]n most cases, the courts still hold the railroad responsible for crossing accidents." *Id.* at 3-1. The Secretary added that "[t]his 'joint responsibility' [between railroads and government bodies] is not necessarily a wrong concept at rail-highway crossings," *id.*—an observation that would make no sense if, as the railroads argue, the MUTCD had in fact transferred sole responsibility for crossing safety devices from railroads to government agencies.

Indeed, far from suggesting that the railroads' escalating tort liability should have been largely preempted

[10] The notion that the MUTCD establishes that state and local government agencies have sole decisionmaking authority with respect to crossing safety devices is also contradicted by the Secretary's regulations governing federally funded crossing improvements. These regulations make clear that even in federally funded projects, the determination of the appropriate safety devices may in some circumstances be made by the railroad. 23 C.F.R. § 646.214(b)(4).

by the MUTCD, the Secretary concluded that "[f]rom a future program standpoint, liability costs can best be addressed and, it is hoped, reduced through improved levels of devices at crossings . . . ." *Id.* at 7-6. Of course, if, as CSX argues, any railroad liability based on inadequate crossing safety devices were *already preempted*, no further improvements should be needed to reduce railroad liability. Instead, all that would be necessary would be for the courts to give preemptive effect to the Manual. The Secretary's failure even to mention this possibility confirms the obvious: the Manual was never intended to constitute a regulation that would preempt the entire subject matter of railroad responsibility for grade crossing safety devices.

Finally, construing the MUTCD as a mandatory regulation providing that only state or local government agencies may make decisions concerning the adequacy of crossing safety devices, and that States may not empower their courts to consider such questions in adjudicating tort actions against railroads, would raise substantial constitutional questions under the Tenth Amendment. Only last Term, in *New York v. United States*, 112 S. Ct. 2408 (1992), this Court held that the federal government may not interfere with the internal allocation of state governmental authority by compelling States either to exercise regulatory authority, or to exercise it in a particular way. As the Court observed, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 2421.

Here, CSX proposes a construction of the MUTCD as a federal directive—applicable even outside the confines of federal funding programs—that the States exert their police power with respect to railroad crossing safety *only* through direct regulation, and not through common-law tort actions. Such interference in the State's allocation of decisionmaking authority clearly would run afoul of the principles animating *New York v. United States*. The existence of such a substantial constitutional objection to

CSX's position underscores the incorrectness of the construction it proposes.

Thus, not only has the Secretary promulgated no substantive regulations that address the subject matter of the selection of gate crossing safety devices for crossings not improved using federal funds, there is also no basis whatsoever for the suggestion that the Secretary has issued a regulation that requires that such devices be selected solely by government bodies or that otherwise precludes the States from imposing a duty of care on the railroads with respect to selection of such devices. Section 434 therefore does not preempt Ms. Easterwood's tort remedy against CSX if it violated its duty of care. On the contrary, the statute expressly permits state regulation of the subject matter of Ms. Easterwood's lawsuit.[11]

B. State Law Tort Actions Against Railroads for Breach of a Duty of Care with Respect to Safety Devices at Crossings Improved with Federal Funds Are Not Preempted

Amicus curiae United States agrees that Ms. Easterwood's tort action against CSX is not preempted to the extent that it is based upon an alleged breach of CSX's duty of care with respect to the installation of safety devices at the crossing where Mr. Easterwood was killed. But the United States asserts that a similar action might

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[11] As the MUTCD recognizes, railroads may often be required, *as a matter of state law*, to obtain government approval of installation of crossing devices. But the need for government approval by no means relieves the railroads of their own duty of care, under the traditional concept of joint responsibility for grade crossings, to initiate safety improvements where necessary. *See, e.g., Southern Ry. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga. App. 1988); *see also* U.S. Br. at 17 n.14. It would, of course, be unfair to hold a railroad liable if it had attempted to correct a safety condition and been prevented from doing so by a state or local government agency. It does not appear from the record, however, that that occurred here. In any event, the issue that would be posed by such a situation would not be a preemption issue, but solely an issue of state tort and administrative law.

be preempted had the crossing been constructed or improved with federal funds.[12] This issue, as the United States appears to recognize (*see* U.S. Br. 26-27), is not presented on the facts of this case, and therefore is not properly before the Court. Moreover, the United States' assertion that there would be preemption in the context of a crossing improved with federal funds ignores the very different functions of the federal regulations governing federal funding of crossing improvements and the state law duty of care placed on the railroad.

The United States rests its argument on the provisions of 23 C.F.R. Part 646, Subpart B, the regulations that "prescribe policies and procedures for advancing Federal-aid projects involving railroad facilities." 23 C.F.R. § 646.200. More specifically, the United States relies on 23 C.F.R. § 646.214(b)(3), which sets forth criteria regarding appropriate warning devices for use in federally funded projects. According to the United States, the "subject matter" of this regulation is the selection of warning devices for federally funded grade crossing projects; thus, the United States argues, any state law that would impose a duty of care on a railroad with respect to the selection of warning devices must be preempted insofar as it would apply to a grade crossing that had been the subject of a federally funded project.

This argument, like the arguments advanced by CSX, is flawed in its overly broad characterization of the "subject matter" of the federal funding regulations. A fair

[12] Even with respect to grade crossings improved with federal funds, the United States concedes that a State could provide a right of action against a railroad based upon the railroad's violation of *federal* standards. *See* U.S. Br. 24 n.26. CSX, it should be noted, also seems to agree that the States are not precluded from providing a right of action for damages resulting from violation of applicable federal standards. *See* CSX Br. 21-22 n.9. The United States also concedes that a railroad could be held liable for breach of a duty of care in light of changed conditions postdating completion of a federally funded grade crossing project. U.S. Br. 24 n.26.

but appropriately narrow way of understanding the concept of the "subject matter" of federal and state regulations under Section 434 is to focus on the functions performed by the regulations. Such an analysis demonstrates that the "subject matter" of the regulations at 23 C.F.R. Part 646 Subpart B is the appropriate usage of limited federal funds in the implementation of grade crossing improvement projects.[13] As the Secretary has explained, "[t]he Federal role in crossing improvement programs is one of overseer to ensure that Federal dollars are appropriately spent." U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 3-2 (April 1989). The Secretary's regulations, including 23 C.F.R. § 646.214, simply carry out that role by setting the conditions on the federal grant of funds for rail crossing improvements.

The United States ignores basic principles of federalism in casually failing to recognize that regulations implementing a federal grant program must be treated differently from direct federal regulation. Standards attached as conditions to federal spending programs are not free-standing sources of law, but are "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Such conditions have the effect of displacing state law only when Congress clearly and unambiguously so states. *Id.* Here, the regulations simply require the States to provide certain safety devices in accordance with stated criteria when a crossing project is carried out with federal funds. There is no clear statement that a further

[13] CSX itself concedes that such a functional approach to the definition of the "subject matter" of a regulation is appropriate under Section 434, for CSX recognizes that the "subject matter" of the Secretary's enforcement regulations is distinct from the "subject matter" of state tort remedies that serve the function of compensating victims of accidents. CSX Br. at 21-22 n.9. Similarly, the function of the federal regulations at 23 C.F.R. § 646.200 *et seq.* is the regulation of federal spending, while the function of a state law duty enforced in a tort action against the railroad is to ensure that the railroad exercises due care in its operations.

condition is the displacement of state tort law. To treat these regulations as establishing, in effect, legally operative ceilings on any additional duty of care a State may demand of its railroads would not only violate the *Pennhurst* clear statement principle, but would also ascribe to the regulations a "subject matter" for purposes of Section 434's preemption analysis that they neither expressly or implicitly address.

Moreover, attributing preemptive force to the regulations governing expenditures on federally funded crossing improvement projects would ignore decades of history indicating that federal financial assistance to the States for railroad-highway safety projects has never been intended to preempt the States from enforcing railroads' own duty of care under the prevailing system of joint private and governmental responsibility for railroad safety. Federal financial assistance to railroad crossing safety projects dates back at least to 1916, and has increased steadily since then. *See generally* U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 1-8 - 1-9 (April 1989). The provision of such federal funding had never been thought to alter the prevailing legal regime of shared public-private responsibility for rail crossing safety, which included tort remedies when railroads were found to have breached their own duty of care. *See id.* at 3-1.

There is no reason to believe that the FRSA, including its preemption language, was intended to radically alter the status quo with respect to the preemptive effect of federal spending programs relating to rail-highway safety (as opposed to direct federal regulation of railway safety). Neither the committee reports nor the members' statements contain any indication that Congress contemplated the elimination of a standard form of railroad tort liability whenever federal funds were involved in crossing safety projects. On the contrary, they demonstrate that Congress contemplated a dual federal-state regime. *See* 115 Cong. Rec. 40202-40207 (Dec. 19, 1969); 116 Cong. Rec. 27610-27621 (August 6, 1970).

Moreover, the Secretary, in his 1989 Report to Congress on crossing safety, indicated that the federal government did not perceive that the extensive federal expenditures for grade crossing improvements had insulated railroads from liability. Quite the contrary: the Secretary stated explicitly that "[t]he trends and needs in this area [i.e., railroad liability for grade crossing accidents] appear largely to be decided *by forces outside the reach of improvement and maintenance programs alone*." U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 7-6 (April 1989) (emphasis added). This statement would make no sense if, as the United States now argues, federal funding of grade crossing improvement projects provides a safe harbor for railroads by preempting any state law-based liability for breach of a duty of care with respect to warning devices. The Secretary's own statements thus make clear that the expenditure of federal funds does not involve the same subject matter as state law duties of care regarding the provision of warning devices. The regulations regarding federally funded projects therefore lack preemptive force under Section 434.

Given (1) the absence of any indication that federal standards relating to the expenditure of federal funds at grade crossings were intended to preempt any state tort actions against railroads, and (2) the fact that the issue of preemption as to federally funded grade crossings is not even presented here, the United States' position is particularly unwarranted. Furthermore, acceptance of the United States' position would simply multiply the practical difficulties posed by tort actions involving grade crossing safety devices. In each case, a determination would have to be made as to whether and to what extent the devices present at a crossing were the result of a federal funding project. Even if federal funding were implicated, the action could still go forward if the plaintiff could establish that the railroad had been involved in a violation of the open-ended standards affecting selection of warning devices for federally funded projects (*see* 23 C.F.R. § 646.214(b)(3)), an inquiry likely to present considerable opportunities for litigation. More-

over, as the United States concedes (*see supra* note 12), the plaintiff could still proceed with an action based on violation of a state law duty of care if there were "changed conditions" since the completion of the federal grade crossing improvement project. The bounds of this exception to preemption are unclear, and would create a quagmire of litigation. Absent a clearer indication that preemption with respect to federally funded grade crossings is warranted under the appropriately narrow reading of Section 434, the Court should not adopt a position that could yield such confusing and unproductive results.

III. A STATE LAW TORT ACTION BASED ON A TRAIN'S EXCESSIVE SPEED IN APPROACHING A GRADE CROSSING IS NOT PREEMPTED

A. The Secretary's Train Speed Regulations Do Not Address the Same Subject Matter as the State Tort Action

Both the district court and the court of appeals held that to the extent Ms. Easterwood sought to establish that CSX violated its duty of care by approaching the grade crossing at an excessive and unsafe speed, her right of action was preempted by 49 C.F.R. § 213.9, which provides maximum speed limits for trains operating on particular classes of track. The lower courts, echoed by CSX, its *amici*, and the United States, reasoned simply that the "subject matter" of both the federal regulation and the state tort action was train speed and that the state right of action was thus preempted. This analysis is untenable, for it is evident that the "subject matters" of the federal regulation and the state tort action—the safety issues they address—are entirely distinct.

Title 49 C.F.R. § 213.9, entitled "Classes of track: operating speed limits" addresses maximum train speeds based on the physical characteristics of railroad tracks. Other sections provide technical specifications for six classes of track, based on gage, alinement, number of crossties, and construction of joints. *See* 49 C.F.R. §§ 213.51-213.143. Section 213.9 simply establishes, for each class of track, the maximum allowable speed for

passenger and freight trains operating on that class of track. The regulation does not address any other factors bearing on appropriate train speed, such as visibility, traffic density, number of grade crossings, or weather conditions. Nor does the regulation (or the history of its promulgation) indicate that the Secretary has expressly determined that such factors should *not* affect train speed. Rather, the regulation is wholly silent on such matters. There is no indication that the regulation addresses anything more than its precise subject matter: the maximum speed the Secretary determined to be safe and appropriate for particular classes of track, viewed from the standpoint of preventing "track-related accidents" such as derailments and track failures. *See, e.g.*, 44 Fed. Reg. 52104, 52106-10 (Sep. 6, 1979); 47 Fed. Reg. 7275 (Feb. 18, 1982).

Indeed, 49 C.F.R. § 213.1, which defines the scope of all regulations contained in Part 213, makes clear the limited function of Section 213.9: "This part prescribes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part *apply to specific track conditions existing in isolation*" (emphasis added). Thus, it is evident that Section 213.9 was *not* intended to address comprehensively the subject matter of all factors bearing on safe train operating speeds, but simply to address, *in isolation*, the question of maximum speeds appropriate for physical classes of track.

By contrast, the subject matter of Ms. Easterwood's tort action is *not* whether the train that killed her husband was operating at a speed appropriate for the class of track on which it was traveling viewed in isolation. Rather, it is whether the railroad violated its duty of care to operate at a reasonable rate of speed, viewed from the standpoint of the safety of persons using the grade crossing that the train was approaching. Nothing in the regulation governing maximum speeds for track classes speaks to this subject at all. The subject is, however, a classic concern of the common law. *See* 74 C.J.S. *Railroads* § 744 (1951).

Thus, the preemption argument of CSX and its *amici* (and the United States) rests on the notion that this Court must adopt the broadest construction of the "subject matter" of the Secretary's regulation and the Georgia tort remedy and hold the latter preempted because both relate to the subject of "speed."[14] But such a decisional methodology is diametrically opposed to that which *Cipollone* mandates: namely, the use of a fair *but narrow* construction of the preemption provision. 112 S. Ct. at 2621. CSX's argument is also contradicted by the legislative history confirming that preemption occurs only when the Secretary has acted on the "*particular* subject matter" of a state regulation. H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4112 (emphasis added). A fair but narrow construction consistent with *Cipollone* and the legislative history would reject preemption on the ground that the Secretary's regulation and the state tort remedy do not pertain to the same subject matter because they serve wholly different functions and address distinct safety concerns.[15] Even if the broader construction advanced by CSX might be permitted by the statutory language, the narrower construction must be chosen to effectuate the

[14] In effect, the construction proposed by CSX and its *amici* is that a state standard is preempted if it relates in some way to the same aspect of railroad operations affected by a federal regulation. Had this been Congress' intent, it is clear that Congress knew how to express it. *Cf.* 15 U.S.C. § 1392(d) ("Whenever a Federal motor vehicle safety standard . . . is in effect, no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment *any safety standard applicable to the same aspect of performance* of such vehicle or item of equipment which is not identical to the Federal standard.") (emphasis added).

[15] Such a construction is consistent with *Burlington Northern R.R. Co. v. Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989), which held that under Section 434, "a state regulation 'covers the same subject matter' as an FRA regulation if it *addresses the same safety concerns* as the FRA regulation" (emphasis added) (citation omitted). Under this standard, the Secretary's regulation and Georgia's tort remedy do not cover the same subject matter, as the safety concerns they address are dissimilar.

presumption against preemption absent a clear statement of Congress's intent. *See Cipollone*, 112 S. Ct. at 2620-21.

CSX contends, however, that a more narrow and focused interpretation of the regulatory "subject matter" under Section 434 conflicts with this Court's rulings in such cases as *Gade v. National Solid Wastes Mgmt. Ass'n*, 112 S. Ct. 2374, 2387 (1992) and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), which CSX argues demonstrate that differences in the purpose of state and federal regulations are irrelevant to preemption analysis. Even leaving aside the obvious point that these cases did not involve the particular statutory language present here, it is evident that those precedents do not go so far as CSX would have the Court believe. The central holding of *Gade*, an implied preemption case, is that a State's "professed purpose" for a regulation is not "solely" determinative of preemption issues; rather, the Court must analyze the actual function and effect of state and federal regulations to determine whether the state regulation "sufficiently interferes with federal regulation that it should be deemed pre-empted." 112 S. Ct. at 2387. Under this standard, it is clear that the federal track speed regulation and the state law duty of care do not in fact " 'operate upon the same object,' " *id.* (citation omitted), nor does the state standard in any way interfere with the subject of the federal regulation.[16]

[16] Similarly, while *Florida Lime & Avocado Growers* (like *Gade* an implied preemption case) stated that whether a state and federal regulation served different or similar objectives was not necessarily determinative of the preemption issue, *see* 373 U.S. at 142, the actual holding of the Court was that a state regulation was not preempted by a federal regulation where, despite a superficial similarity in purpose and "subject matter," the two regulations served different and not contradictory functions. *See id.* at 145-46. There is likewise no preemption here where the state standard and federal regulation address different issues and have different, noncontradictory functions.

B. The Federal Regulations Do Not Reflect a Judgment That Trains Should Not Moderate Their Speed to Enhance Crossing Safety

CSX and its *amici* argue at length that decreased train speed does not in any way enhance crossing safety, and that the Secretary's regulations implicitly reflect a judgment that there should be no state or federal regulation of train speed beyond that contained in 49 C.F.R. § 213.9. These arguments are, of course, of dubious relevance given that this is an express preemption case. Under *Cipollone*, the existence of an express preemption provision in a statute obviates any inquiry into implied preemption: the scope of preemption is determined by the statute's express terms. *See Cipollone*, 112 S. Ct. at 2618.[17] Moreover, the nature of the preemption provision here underscores the absence of any implied preemption: Section 434 expressly permits *any* state regulation with respect to railroad safety unless the Secretary has promulgated regulations addressing the particular subject matter.

In any event, the policy arguments of CSX and its *amici* are far from persuasive. The factual record before this Court simply does not permit the Court to make a judgment that state law-based restrictions on excessive train speed produce no safety benefits or are counterproductive. Moreover, the railroads' arguments in this respect suffer obvious logical flaws. CSX and its *amici* stress that even at reduced speeds trains will usually be unable to brake in time to avoid a crossing accident, and that any attempt to do so will pose grave risks of derailment. But even if this is true, reduced train speeds still have obvious safety benefits in that they allow motor vehicle drivers at grade crossings increased time for reaction and avoidance, and may significantly reduce the severity of grade crossing accidents.

For these reasons, the Secretary of Transportation has —contrary to the assertions of CSX and its *amici*—identified high train speeds as a serious safety concern. In the Secretary's 1989 Report to Congress, the hazards of high speed trains received repeated emphasis. The Report attributed recent increases in grade crossing accident fatalities to "higher average train speeds" resulting from upgraded track conditions. U.S. Dept. of Transportation, *Rail-Highway Crossings Study* 2-10 (April 1989). Moreover, the Report emphasized that increased train speeds make crossing accidents more likely (*id.* at 6-6):

> [T]he driver's task of determining whether a train is approaching and whether it is safe to proceed is difficult; even with good visibility up and down the track, it is difficult from the crossing to judge the time and distance of a train approaching at moderate speed. At high train speeds, the problem is critically compounded.

Thus, the Report found, "the hazards inherent at any crossing would be compounded by the presence of high-speed trains, particularly if there were a mix of high-speed and low-speed movements." *Id.* at 6-5.[18]

Ultimately, of course, the preemption issue depends not on this Court's judgment whether it is reasonable for the States to hold railroads to a duty of care with regard to train speed, but whether the Secretary of Transportation has preempted such a duty by promulgating regulations addressing the same subject matter. CSX attempts to argue that the Secretary has regulated the subject matter of train speed at crossings not by issuing a regulation applicable to that particular subject matter, but rather by providing that active warning signals at grade crossings must provide no less than 20 seconds warning of the approach of a train, regardless of its speed. MUTCD 8C-7.[19] Plainly, however, this provision does not address

[17] Thus, the United States' half-hearted argument that it has effectively occupied the field with respect to train speed, *see* U.S. Br. 29-30, is simply inadmissible.

[18] *See also* National Transportation Safety Board, Safety Recommendations R-86-49 through 57 (Jan. 13, 1987) (identifying high speed of trains as factor in reducing effectiveness of train horns as warning device).

[19] This provision in the Manual, of course, applies only where active warning signals are provided, and there is no dispute that

the subject matter of reasonable train speed at grade crossings—it is simply agnostic on the subject. CSX's error is in assuming equivalence between a regulation providing that "whatever the speed of the train, a warning device should provide 20 seconds' warning" and one that provides that "if there is 20 seconds' warning, any train speed is permissible." The subject of adequate warning time (whatever the train's speed) is, under the appropriately fair but narrow construction of Section 434, not the same as the subject of reasonable train speed.

What CSX would have the Court believe is that the Secretary's regulations reflect a determination that it is *not* appropriate to require trains to pay any attention to crossings in determining their speeds, and that instead trains should be free to proceed through any crossing at the maximum allowable speed for the physical class of track involved, so long as active warning devices (if any) are set to provide 20 seconds' warning to motorists. Of course, had the Secretary actually promulgated a regulation stating this, it would have preemptive effect. But CSX points to no such regulation, nor to any indication in the history of the Secretary's regulations reflecting that such a determination has been made. All CSX can point to is an implication from silence—that since the Secretary has not promulgated regulations indicating that trains should approach grade crossings at a reasonable

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the Manual does not mandate the use of such signals at any crossing. It is therefore implausible to convert this standard into one that addresses the subject of train speeds at crossings generally. Similarly, CSX's reliance on the portions of 23 C.F.R. § 646.214 (b)(3)(i) that indicate that train speeds are among the factors to be considered in determining when automatic gates are to be used at *federally funded* crossings is irrelevant to this case, for the reasons stated *supra*, at 10-17. Finally, contrary to CSX's assertion, the statement in 49 C.F.R. § 213.9(c) that grade crossing protection should be considered when a railroad requests permission to operate at speeds in excess of 110 miles per hour (a circumstance not present here) does not indicate that the Secretary has regulated with respect to the subject matter of train speeds at grade crossings outside of that narrow situation.

speed, the Secretary must have intended that railroads be free from any such obligation. But under the terms of Section 434, such an implication is, precisely, *not* sufficient to preempt state law. Section 434 specifies how state law is preempted: there must be a federal regulation that actually addresses the particular subject matter of the state law. With respect to train speed at grade crossings, there is no such federal regulation.

IV. STATE TORT REMEDIES FOR BREACH OF A RAILROAD'S DUTY OF CARE WITH RESPECT TO CROSSING SAFETY OR TRAIN SPEED ARE NOT PREEMPTED BECAUSE THEY ADDRESS ESSENTIALLY LOCAL SAFETY HAZARDS

Even if federal regulations could be said to cover the same "subject matter" as Ms. Easterwood's causes of action based on CSX's alleged negligence with respect to crossing safety devices and train speeds, those causes of action would still not be preempted because they fall within Section 434's savings clause for local hazards. This provides: "[a] State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

The duty of care Ms. Easterwood's tort cause of action seeks to impose on CSX reflects precisely such a standard aimed at "essentially local safety hazards." The essence of Ms. Easterwood's claims is that CSX's actions were not reasonable in light of the particular local circumstances of the crossing where her husband was killed. The common law duties that Ms. Easterwood seeks to enforce inherently concern local hazards, and fall within the scope of the savings clause. Only in the most abstract and general sense can these duties be considered "Statewide standards superimposed on national standards covering the same subject matter" that Congress sought to preempt. H.R. Rep. No. 1194, 91st Cong., 2d Sess., *re-*

printed in 1970 U.S. Code Cong. & Admin. News 4104, 4117. Rather, the perpetuation of such common law duties accords with the legislative intention to "enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards," and to take action with respect to "local hazards . . . not Statewide in character." *Id.* Given the need to interpret the statute narrowly to avoid preemption, Ms. Easterwood's tort remedy must be considered to be aimed at "essentially local safety hazards." Since it is clearly not incompatible with federal law, it cannot be preempted unless it imposes an undue burden on interstate commerce, which cannot be established on the present record.

Such a narrow reading of Section 434's preemptive scope as to state law tort remedies is supported not only by the presumption against preemption, but also by the absence of any suggestion in the legislative history that Section 434 was intended to preempt state tort actions based on allegations that a railroad violated its duty of care with respect to a particular local incident. Neither the House Report, *supra*, nor the floor debates indicate any discussion of the possibility that the statute was intended to preempt such tort remedies. *See* 115 Cong. Rec. 40202-07 (Dec. 19, 1969); 116 Cong. Rec. 27610-21 (Aug. 6, 1970). Particularly in light of the absence of any clear indication that Congress intended to displace this well-established body of state common law, the savings clause should be given its fair but narrow reading to preserve common law remedies based on local conditions.

CONCLUSION

In No. 91-790, the judgment of the court of appeals should be affirmed insofar as it holds Ms. Easterwood's right of action based on CSX's alleged failure to exercise due care with respect to crossing safety devices is not preempted. In No. 91-1206, the judgment of the court of appeals should be reversed insofar as it holds Ms. Easterwood's right of action based on the allegedly excessive speed of CSX's train is preempted.

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